Supreme Court, U.S.
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RECORDS AND BRIEFS

No. 04-1433

In The

Supreme Court of the United States

ZIGGY BAJBOR,

Petitioner,

v.

OFFICE OF COMPLIANCE and
OFFICE OF THE ARCHITECT OF THE CAPITOL,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Federal Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The Congressional Accountability Act of 1995 provides a separate and distinct private cause of action based on unlawful retaliatory employment practices taken by an employing office to intimidate, take reprisal against, any covered employee because the covered employee has opposed any practice made unlawful by this Act, or because the covered employee has initiated proceedings, made a charge, or testified, assisted, or participated in any manner in a hearing or other remedy under this Chapter. The questions presented by this case are:

1. Whether Congress deprived the Board of Directors of the Office of Compliance authority to promulgate substantive regulations respecting 2 U.S.C. § 1317(a) of the Congressional Accountability Act of 1995?

2. Whether Congress deprived the Board of Directors of Respondent Office of Compliance authority to limit the subject matter jurisdiction of retaliatory claims brought under 2 U.S.C. § 1317(a) by promulgating substantive policy by adjudication?

PARTIES TO THE PROCEEDINGS BELOW

Appellant in the court of appeals was petitioner Ziggy Bajbor. Bajbor was the complainant in the Office of Compliance and the Office of the Architect of the Capitol was the respondent in the Office of Compliance.

Appellees in the court of appeals were respondents Office of Compliance and Office of the Architect of the Capitol.

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PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Federal Circuit.

OPINIONS BELOW

The Hearing Officer's memorandum opinion and order dismissing the Complaint in Case No. 00-AC-105(AG, RP) and Federal Circuit Case No. 03-6005, "*Bajbor I*," is unpublished and is reproduced herein as pages 2-18 of the Appendix. The decision of the Board of Directors of the Office of Compliance, "Respondent Board," is unpublished and is reproduced herein as pages 19-20 of the Appendix.

The Hearing Officer's memorandum opinion and order dismissing the Complaint in Case No. 01-AC-377(RP) and Federal Circuit Case No. 04-6002, "*Bajbor II*," is unpublished and is reproduced herein as page 21 of the Appendix. The decision of Respondent Board is unpublished and is reproduced herein as pages 22-31 of the Appendix.

The Federal Circuit consolidated the appeals in *Bajbor I* and *Bajbor II*. The Federal Circuit's opinion affirming the decisions in *Bajbor I* and *Bajbor II* is unpublished and is reproduced herein as page 1 of the Appendix. The Federal Circuit's order denying rehearing and rehearing *en banc* is unpublished and is reproduced herein as pages 32-33 of the Appendix.

JURISDICTION

The Federal Circuit issued its order denying rehearing and rehearing *en banc* on January 25, 2005. This Court has jurisdiction to hear this petition pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The consolidated appeal involves 207(a), 2 U.S.C. § 1317(a) of the Congressional Accountability Act of 1995, the "CAA," 2 U.S.C. § 1301, *et seq.*

Section 1317(a) provides:

> PROHIBITION OF INTIMIDATION AND REPRISAL.
>
> (a) In General. – It shall be unlawful for an employing office to intimidate, take reprisal against, any covered employee because the covered employee has opposed any practice made unlawful by this Act, or because the covered employee has initiated proceedings, made a charge, or testified, assisted, or participated in any manner in a hearing or other remedy under this Chapter.

The above statutory provisions are reproduced at greater length at App. 41-42.

STATEMENT OF THE CASE

In December 2000, contemporaneous with his pro se submission of a Request for Counseling with the Office of Compliance in *Bajbor I*, Petitioner advised Respondent Office of the Architect of the Capitol, "Respondent AOC,"

that he had submitted said Request for Counseling. Said Request for Counseling, submitted pursuant to 2 U.S.C. § 1402 of the Administrative-Judicial Dispute Resolution Procedures of the CAA, alleged that Petitioner's nonselection for two employment positions for which he had applied was based on age discrimination and retaliation based on Petitioner's prior participation in federally protected activities pursuant to Petitioner's prior Case Number 98-AC-57(AG, RP). *See* App. 37, 41-42.

Petitioner, approximately twelve weeks subsequent to filing his Request for Counseling in *Bajbor I* and pursuant to his statutory entitlement established by Section 4.3 and Section 4.4.1 of the Architect of the Capitol's Personnel Manual Chapter 335, requested Respondent AOC provide him with copies of the Promotion Files established for the two employment positions for which he had applied and was not selected. *See* App. 61-63. The Architect of the Capitol's Personnel Manual Chapter 335, "Chapter 335," were statutory regulations duly promulgated pursuant to 40 U.S.C. § 166b-7(c)(2)(A) and 40 U.S.C. § 166b-7(d) of the Architect of the Capitol's Human Resources Act, the "HRA," and had the force and effect of law. Petitioner, pursuant to his Chapter 335 statutory entitlement set forth in Sections 4.3.1 *et seq.* and 4.4.1, was not seeking "discovery" pursuant to "litigation" under the CAA. *See* App. 61-63. Petitioner's request pursuant to Chapter 335 was made in accordance with his statutory entitlement, terms, conditions and privileges of employment with Respondent AOC provided by the Human Resources Act. Petitioner's request pursuant to Chapter 335 was not "discovery" pursuant to "litigation" under the CAA.

Petitioner made his Chapter 335 request approximately twelve weeks into the "administrative" phases of *Bajbor I*. *See* Section 1402 and Section 1403 of the Administrative-Judicial Dispute Resolution Procedures of the CAA. *See* App. 52-54.

Respondent AOC, arbitrarily and in violation of Petitioner's Chapter 335 statutory entitlement, neither provided the requested copies of the Promotion Files nor responded to Petitioner's written request for said Promotion Files.

As Petitioner's request for the Promotion Files and Respondent AOC's refusal to provide copies of said Promotion Files or respond to Petitioner's request for same, the subject matter of *Bajbor II*, occurred subsequent to the Request for Counseling submitted in *Bajbor I*, the *Bajbor II* claims are outside the parameters of the *Bajbor I* claims and are excluded from the *Bajbor I* "litigation" pursuant to 2 U.S.C. § 1402 and 2 U.S.C. § 1403 of the Administrative-Judicial Dispute Resolution Procedures. *See* App. 52-54. The comprehensive statutory scheme established by Congress for the CAA contains no provision for waiving the "Request for Counseling" and Mediation procedures set forth in 2 U.S.C. § 1402 and 2 U.S.C. § 1403 of the CAA.

Petitioner, pursuant to his "litigation" of *Bajbor I*, subpoenaed the Promotion Files for the hearing in *Bajbor I* pursuant to Section 6.1 of the Procedural Rules of the Office of Compliance. Respondent AOC moved to quash the subpoena on the basis of a non-existent and unidentified legal privilege. The Hearing Officer determined that Petitioner was entitled to only certain material in said Promotion Files which material did not encompass the

larger scope of Petitioner's Chapter 335 statutory entitlement. *See* Section 4.3.1 *et seq.* of Chapter 335. *See* App. 61-62. The Hearing Officer, pursuant to the Motion to Quash, did not rule on the merits of the allegations contained in *Bajbor II*; did not rule on whether the refusal by Respondent AOC to turn over the documents in the Promotion File to Petitioner pursuant to his Chapter 335 request was in violation of Chapter 335; and, did not rule on whether Respondent AOC's refusal, if it were in violation of Petitioner's Chapter 335 statutory entitlement, was an unlawful retaliatory employment practice in violation of 2 U.S.C. § 1317(a).

The Hearing Officer dismissed the Complaint in *Bajbor I*.

The Hearing Officer in *Bajbor II*, pursuant to a Motion to Dismiss, determined that the denial of the Promotion Files did not rise to the level of an adverse action within the meaning of that term as defined by the Courts and that the denial of the Promotion Files, as an issue, had been litigated and resolved in *Bajbor I*.

Respondent Board, in affirming the decision of the Hearing Officer in *Bajbor II* and absent statutory authority, established as a category of unlawful retaliatory employment practices deprived of subject matter jurisdiction under 2 U.S.C. § 1317(a) retaliatory claims arising during the course of "litigation." Respondent Board further declared that "litigation" commenced with the filing of a Request for Counseling pursuant to Section 1402 of the CAA. *See* App. 53.

Petitioner appealed to the Federal Circuit arguing that neither the Hearing Officer nor Respondent Board had statutory authority to promulgate substantive regulations

respecting the statutory parameters and subject matter jurisdiction of retaliatory claims brought pursuant to 2 U.S.C. § 1317(a) whether by due process notice and comment rulemaking or by adjudication.

The Federal Circuit, without opinion, affirmed the decisions of Respondent Board. App. 1.

Petitioner sought rehearing and rehearing *en banc*, both of which were denied. App. 32-33.

This petition for *certiorari* followed.

REASONS FOR GRANTING THE WRIT

I. RESPONDENT BOARD OF DIRECTORS IS DEPRIVED OF RULEMAKING AUTHORITY WITH RESPECT TO 2 U.S.C. § 1317(a)

Respondent Board, by its decision in *Bajbor II* and absent statutory authority, asserts jurisdiction to promulgate substantive regulations limiting the subject matter jurisdiction of 2 U.S.C. § 1317(a) and limiting the Petitioner's accessibility to the Administrative-Judicial Dispute Resolution Procedures of the CAA.

Respondent Board, by its decision in *Bajbor II* and absent statutory authority, established a category of retaliatory claims deprived of subject matter jurisdiction based on the unlawful retaliatory practices arising and occurring during the course of "litigation" which commenced with the filing of a Request for Counseling.

Respondent Board, by its decision in *Bajbor II* and absent statutory authority, unconstitutionally deprived Petitioner of his Fifth Amendment property interest in

Bajbor II, a retaliatory cause of action brought pursuant to 2 U.S.C. § 1317(a). *See Logan* v. *Zimmerman Brush Co.*, 455 U.S. 422 (1982).

Respondent Board, by its decision in *Bajbor II* and absent statutory authority, established as a matter of law an affirmative defense to retaliatory claims arising during the course of "litigation," an affirmative defense not raised by or known to Respondent AOC or Petitioner thereby accounting for the absence of an analog in the Executive Branch and private sectors.

This case involves Respondent Board's construction of 2 U.S.C. § 1317(a), a statute that it administers. The framework for analyzing Respondent Board's assertion of authority to promulgate substantive regulations by adjudication is governed by *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). Under *Chevron*, a reviewing court must first ask "whether Congress has directly spoken to the precise question at issue." Id. at 842. If Congress has done so, the inquiry is at an end; the court "must give effect to the unambiguously expressed intent of Congress." Id., at 843; *see also United States* v. *Haggar Apparel Co.*, 526 U.S. 380, 392 (1999); *Holly Farms Corp.* v. *NLRB*, 517 U.S. 392, 398 (1996). But if Congress has not specifically addressed the question, a reviewing court must respect the agency's construction of the statute so long as it is permissible. *See INS* v. *Aguirre-Aguirre*, 526 U.S. 415, 424 (1999); *Auer* v. *Robbins*, 519 U.S. 452, 457 (1997). Such deference is justified because "the responsibilities for assessing the wisdom of such policy choices and resolving the struggle between competing views of the public interest are not

judicial ones," *Chevron*, supra, at 866, and because of the agency's greater familiarity with the ever-changing facts and circumstances surrounding the subjects regulated, *see Rust* v. *Sullivan*, 500 U.S. 173, 187 (1991).

In determining whether Congress has specifically addressed the question at issue, a reviewing court does not confine itself to examining a particular statutory provision in isolation. It is a "fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme." *Davis* v. *Michigan Dept. of Treasury*, 489 U.S. 803, 809 (1989). A court must place the provision in context, interpret the statute "as a symmetrical and coherent regulatory scheme," *Gustafson* v. *Alloyd Co.*, 513 U.S. 561, 569 (1995), and "fit, if possible, all parts into an harmonious whole," *FTC* v. *Mandel Brothers, Inc.*, 359 U.S. 385, 389 (1959).

An administrative agency's power to regulate must always be grounded in a valid grant of authority from Congress. In an effort to effectuate the congressional purpose of protecting the public, the Court must take care not to extend the scope of the statute beyond the point where Congress indicated it would stop. *See United States* v. *An Article of Drug . . . Bacto-Unidisk*, 394 U.S. 784, 800 (1969), citing *62 Cases of Jam* v. *United States*, 340 U.S. 593, 600 (1951).

The court must place the provision in context, interpreting the statute to create a symmetrical and coherent regulatory scheme. *Gustafson* v. *Alloyd Co.*, 513 U.S. 561, 569 (1995).

The court is also to be guided by common sense as to the likelihood that Congress delegated a policy decision of

such political magnitude to the five unelected attorneys principally engaged in private practice who make up the membership of Respondent Board: establishing an affirmative defense which limits the broad subject matter jurisdiction of the general retaliatory provision of the CAA as enacted by Congress. It is highly unlikely that Congress, given the unique political history of the institution and the revolutionary nature of the CAA and the years of hurdles, would leave the statutory parameters and standards of the general retaliatory statutes to the unchecked discretion of the five unelected private attorneys principally engaged in the private practice of law.

With these principles in mind, Petitioner contends that Congress has directly spoken to the instant issues and precluded Respondent Board from engaging in policymaking, substantive regulations and creation of an affirmative defense limiting the subject matter jurisdiction of 2 U.S.C. § 1317(a).

Reading of the CAA as a whole reveals that Congress, by inclusion and exclusion and not by failure or inadvertence, intentionally deprived Respondent Board explicit and implicit authority to promulgate policy, standards, and regulations respecting 2 U.S.C. § 1317, the general retaliatory statute of the CAA. That Congress was aware of other definitions, standards, rights, remedies and procedures is made evident by the distinguishing statutory language set forth in 2 U.S.C. § 1311(c), respecting the Congressional Accountability Act's application of the remedies and procedures of 42 U.S.C. § 2000e-16 to the General Accounting Office, Government Printing Office and Library of Congress by way of the chief official of said instrumentalities as opposed to the authorities of the Equal Employment Opportunity Commission. Congress

did not through inadvertence fail to consider Title VII and reject its restrictive limitations.

Congress, while intentionally depriving Respondent Board with authority to promulgate policy with respect to 2 U.S.C. § 1317(a), explicitly delegated said authority to Respondent Board pursuant to due process notice and comment rulemaking for the Acts hereinafter enumerated and made applicable by the CAA: the Family and Medical Leave Act of 1993 – 2 U.S.C. § 1312(d); Fair Labor Standards Act of 1938 – 2 U.S.C. § 1313(c); Employee Polygraph Protection Act of 1968 – 2 U.S.C. § 1314(c); Worker Adjustment and Retraining Notification Act – 2 U.S.C. § 1315(c); rights and protections relating to Veterans' Employment and Reemployment – 2 U.S.C. § 1316(c); the rights and protections under Americans with Disabilities Act of 1990 relating to public services and accommodations; procedures for remedy of violations, 2 U.S.C. § 1331; the Occupational, Safety and Health Act of 1970 – 2 U.S.C. § 1341(c)(6)(2); and, Labor-Management Relations, 2 U.S.C. § 1351. *See* App. 38-46.

Congress did not delegate to the Board the statutory authority to promulgate substantive regulations for 2 U.S.C. § 1317(a); the enactments providing the broad standards the Board was to employ to remedy unlawful retaliatory employment practices. "[W]here Congress includes particular language in one section of a statute but omits it in another . . . , it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." *Babbitt* v. *Sweet Home Chapter of Communities For a Great Oregon*, 515 U.S. 687 (1995), citing *Keene Corp.* v. *United States*, 508 U.S. 200 (1993).

This is not a case of simple inaction or a failure by Congress to act. It is obvious Congress considered and rejected giving Respondent Board the necessary delegated authority. Congress precluded a meaningful role for Respondent Board in making substantive policy respecting 2 U.S.C. § 1317(a). Regulation of 2 U.S.C. § 1317(a) is in the domain of Congress. Any move by Respondent Board to promulgate by adjudication or due process rule making would be inconsistent with the clear congressional intent of the statute. Congress reserved substantive policy to itself. Congress was proven accurate as the substance of the affirmative defense manufactured by Respondent Board is incompatible with the regulatory scheme enacted by Congress and incompatible with the primary purpose of 2 U.S.C. § 1317(a).

II. RESPONDENT BOARD IS AN "UMPIRING AGENCY ONLY" WITH RESPECT TO 2 U.S.C. § 1317(a)

Respondent Board and the ad hoc contract Hearing Officer, pursuant to their respective roles in the Administrative-Judicial Dispute Resolution Procedures of the CAA are not policymakers with respect to their functions as decisionmakers charged with drawing a specific conclusion from a given set of facts at issue. *See* App. 55-60. To the extent that Respondent Board functions as an umpire, the relatively limited role of an administrative adjudicator and not as a policymaker, Respondent Board's decision is not entitled to deference. Further, as substantive rulemaking authority with respect to 2 U.S.C. § 1317(a) has been denied to the Respondent Board by Congress, Respondent Board is neither entitled to make policy in the adjudicative setting nor to disguise policymaking as factfinding and

thereby escape the legal and political limitations to which policymaking is subject. *See NLRB* v. *Curtin*, 494 U.S. 775, 819 (1990) citing *NLRB* v. *Bell Aerospace Co.*, 416 U.S. 267, 294-95 (1974). As the Board, with respect to 2 U.S.C. § 1311 and 2 U.S.C. § 1317(a) does not make policy, " . . . its interpretation of the [Chapter] . . . is not entitled to any special deference from the courts." *See Snowden* v. *Director, Office of Workers' Compensation Programs, United States Dept. of Labor*, 347 U.S.App.D.C. 12, 253 F.3d 725 (D.C.Cir. 06/19/2001) citing *Potomac Elec. Power Co.* v. *Director, OWCP*, 449 U.S. 268, 278 n.18 (1980) (citing *Hastings* v. *Earth Satellite Corp.*, 628 F.2d 85, 94 (D.C. Cir. 1980); *Tri-State Terminals, Inc.* v. *Jesse*, 596 F.2d 752, 757 n.5 (7th Cir. 1979); and *see Pittston Stevedoring Corp.* v. *Dellaventura*, 544 F.2d 35, 48-49 (2d Cir. 1976), aff'd sub nom. *Northeast Marine Term. Co.* v. *Caputo*, 432 U.S. 249, 97 S. Ct. 2348, 53 L. Ed. 2d 320 (1977).

III. THE BROAD STATUTORY PARAMETERS OF 2 U.S.C. § 1317(a)

Congress established a broad statutory parameter for claims of retaliation under 2 U.S.C. § 1317(a). The broad statutory standard is consistent with and necessary for achievement of the primary statutory policy and goal of Congress: unfettered access to the remedial statutory mechanisms established for the implementation of the eleven statutes made applicable by the CAA. *See* 2 U.S.C. § 1302. *See* App. 34. Any adverse treatment that is based on a retaliatory motive and is reasonably likely to deter the charging party or others from engaging in any protected activity provided by said eleven statutes, regardless

of the level of harm which goes to the issue of damages and not liability, is prohibited by 2 U.S.C. § 1317(a).

The Board is not authorized, by due process rulemaking or by adjudication, to establish any substantive standard altering the broad statutory standard established by Congress respecting subject matter jurisdiction.

To construe 2 U.S.C. § 1317(a), as providing Respondent Board, acting as an arbiter, with authority to establish policy respecting "subject matter jurisdiction" is to expand the power of Respondent Board to an extent that Congress did not intend and has not authorized. It is axiomatic that an administrative agency's power is limited to the authority delegated by Congress. *See Bowen* v. *Georgetown University Hospital,* 488 U.S. 204 (1988). Respondent Board cannot point to any constitutional, statutory or case law authority, providing said Board with the authority to promulgate regulations and standards pursuant to its adjudication of a cause of action pursuant to 2 U.S.C. § 1317(a) or pursuant to due process rulemaking. "This lack of specific attention to the statutory authorization is especially important . . . , that one factor to be considered in giving weight to an administrative ruling is 'the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, . . . '" *See SEC* v. *Sloan*, 436 U.S. 103, 117-118 (1978) citing *Adamo Wrecking Co.* v. *United States*, 434 U.S. 275, 287 n.5 (1978). " . . . '[S]ince this Court can only speculate as to the Commission's reasons for reaching the conclusion that it did, the mere [assertion], without a concomitant exegesis of the statutory authority for doing so, obviously lacks power to persuade' as to the existence of such authority." Id. at 118. "The construction put on a

statute by the agency charged with administering it is entitled to deference by the courts, and ordinarily that construction will be affirmed if it has a 'reasonable basis in law.' . . . But the courts are the final authorities on issues of statutory construction, *FTC* v. *Colgate-Palmolive Co.*, 380 U.S. 374, 385 (1965), and 'are not obliged to stand aside and rubber-stamp their affirmance of administrative decisions that they deem inconsistent with a statutory mandate or that frustrate the congressional policy underlying a statute.' *NLRB* v. *Brown*, 380 U.S. 278, 291." *Volkswagenwerk Aktiengesellschaft* v. *FMC*, 390 U.S. 261, 272 (1968).

Any assertion of power limiting Petitioner's legal arsenal was not imposed by Congress and amounts to Respondent Board's entrance into substantive aspects to an extent Congress has not countenanced. *See NLRB* v. *Insurance Agents' International Union*, 361 U.S. 477, 497-498 (1960). "The role assumed by [the] Board in this area is fundamentally inconsistent with the structure of the Act and the functions of the sections relied upon. The deference owed to an expert tribunal cannot be allowed to slip into a judicial inertia which results in the unauthorized assumption by an agency of major policy decisions properly made by Congress." *See American Ship Building Co.* v. *NLRB*, 380 U.S. 300, 318 (1965).

Justice White, speaking for the Court in *FEC* v. *Democratic Senatorial Campaign Committee*, 454 U.S. 27, 32 (1981) stated that "[Courts] must reject administrative constructions of [a] statute, whether reached by adjudication or by rulemaking, that are inconsistent with the statutory mandate or that frustrate the policy that Congress sought to implement." *See SEC* v. *Sloan*, 436 U.S. 103, 118 (1978); *FMC* v. *Seatrain Lines, Inc.*, 411 U.S. 726,

745-746 (1973); *Volkswagenwerk* v. *FMC*, 390 U.S. 261, 272 (1968); *NLRB* v. *Brown*, 380 U.S. 278, 291 (1965).

The inescapable conclusion is that there is no room for Respondent Board's decision limiting the subject matter jurisdiction and the broad statutory parameters intended and enacted by the Congress.

IV. RESPONDENT BOARD'S DECISION IN *BAJBOR II* IS INCOMPATIBLE WITH THE COMPREHENSIVE STATUTORY SCHEME RESPECTING THE PROMULGATION OF SUBSTANTIVE REGULATIONS PURSUANT TO THE CONGRESSIONAL ACCOUNTABILITY ACT OF 1995

An administrative agency's power to regulate must always be grounded in a valid grant of authority from Congress. Courts must take care not to extend a statute's scope beyond the point where Congress indicated it would stop. *See United States* v. *An Article of Drug . . . Bacto-Unidisk*, 394 U.S. 784, 800.

The Court, in determining whether Congress has spoken to depriving Respondent Board authority to promulgate substantive regulations for 2 U.S.C. § 1317(a) in the adjudicative setting must consider the CAA as written and as a whole and recognize that Congress, pursuant to its political structure, established a comprehensive scheme for the promulgation of substantive regulations by due process rulemaking in order to accommodate the three separate and distinct Congressional jurisdictions subject to the Congressional Accountability Act: the Senate, the House and the Congressional instrumentalities.

A standard promulgated by adjudication based on a particular complaint, a particular petitioner and a particular respondent may only apply to the particular jurisdiction against whom the complaint is brought, the particular petitioner and the particular respondent. It is the Congress who deliberates and determines, by one-House resolution, concurrent resolution or joint resolution with presentment to the President, what substantive policy, standards and regulations are acceptable to their respective Houses.

The comprehensive statutory scheme and administrative procedures of the CAA accommodate both the political and power structure and specific intent of Congress to reserve exclusive control over authority to determine, pursuant to the deliberative process, the substantive policies applying to their respective jurisdictions. Policy-making, by adjudicative ruling, inverts the statutory reservation of authority in Congress.

The breadth of policy afforded by the promulgation of substantive policy, standards and regulations in the adjudicative setting far exceeds the parameters of authority Congress devised in the administrative scheme policing itself.

Given the political significance of the Congressional Accountability Act, it is extremely unlikely that Congress would have intended to place the promulgation of substantive regulation in the hands of the five unelected attorneys who serve on the Board of Directors of the Office of Compliance.

It was the elected Congress, not the appointed Board of Directors, who made the Contract with America which produced the Congressional Accountability Act. Congress

was intent to fill the political need of making Congress subject to the same laws as everyone else. But Congress has broad constitutional authority to govern its own members and employees. *See* Article I, United States Constitution. Congress jealously guards the sovereignty of its institution against intrusions by the executive branch, asserting the separation of powers principle as a barrier to each incursion by Cabinet officers and administrative bodies. *Mistretta* v. *United States*, 488 U.S. 361 (1989). The same jealously guards the sovereignty of the respective Houses of Congress against each other and against the respective Congressional instrumentalities. The political and power structures in the Congress is most relevant to understanding the basis for Congress withholding and controlling thereby the promulgation of substantive regulations under 2 U.S.C. § 1317(a).

Promulgation of substantive regulations by Respondent Board's exercise of jurisdiction in the adjudicative setting contradicts the clear intent of Congress to maintain the power and control revealed in the comprehensive statutory scheme set forth in 2 U.S.C. § 1384.

An administrative agency may not exercise its authority "in a manner that is inconsistent with the administrative structure that Congress enacted into law." *ETSI Pipeline Project* v. *Missouri*, 484 U.S. 495, 517 (1988). Congress, by 2 U.S.C. § 1384, spoke to the manner in which substantive regulations were to be promulgated.

It is clear, based on the overall statutory and regulatory scheme of the CAA, that Congress spoke to the question at issue and evidenced a clear intent to preclude a meaningful policymaking role for Respondent Board with respect to 2 U.S.C. § 1317(a) by the adjudicative

process. The authority exercised by Respondent Board in the instant matter is clearly inconsistent with the due process rulemaking procedures set forth in 2 U.S.C. § 1384. The authority exercised by Respondent Board in the instant matter is *ultra vires*, unlawful and impermissible.

V. RESPONDENT BOARD'S DECISION IN *BAJBOR II* IS INCOMPATIBLE WITH THE COMPREHENSIVE STATUTORY SCHEME PROVIDED IN THE ADMINISTRATIVE-JUDICIAL DISPUTE RESOLUTION PROCEDURES OF THE CONGRESSIONAL ACCOUNTABILITY ACT OF 1995

Considering the CAA as a whole, it is clear that Respondent Board's decision in *Bajbor II* is incompatible with, defeats, makes irrelevant and abrogates the CAA's comprehensive statutory scheme set forth in the Administrative-Judicial Dispute Resolution Procedures of the CAA. *See* 2 U.S.C. § 1401 *et seq*. *See* App. 52.

The subject matter pertaining to *Bajbor II*, Petitioner's request for copies of the Promotion Files pursuant to his statutory entitlement under Chapter 335 and Respondent AOC's refusal to provide same or respond to Petitioner's request, occurred subsequent to the filing by Petitioner of his Request for Counseling in *Bajbor I*, thereby requiring Petitioner to submit another Request for Counseling and to participate in another mediation pursuant to the mandatory statutory requirements of 2 U.S.C. § 1402 and 2 U.S.C. § 1403. The subject matter of the *Bajbor I* and *Bajbor II* Requests for Counseling reflect separate and distinct violations of separate and distinct statutory entitlements and procedures under the CAA and the Architect of the Capitol's Human Resource Act, 40

U.S.C. § 166b-7. The Hearing Officer in *Bajbor I* recognized the distinction between *Bajbor I* and *Bajbor II* and expressly refused to rule on the merits and substantive issues in *Bajbor II* when she ruled on Respondent AOC's Motion to Quash the subpoena for the production of documents in *Bajbor I*.

Respondent Board, by its decision in *Bajbor II*, bypasses and abrogates the mandatory requirements of the Administrative-Judicial Dispute Resolution Procedures of the CAA where there is no discretionary authority to do so.

Most importantly however, Respondent Board's decision in *Bajbor II*, makes irrelevant and superfluous the alternative internal grievance procedures of Respondent AOC made available by the provisions of 2 U.S.C. § 1401 of the Administrative-Judicial Dispute Resolution Procedures of the CAA.

Section 1401, Procedure for Consideration of Alleged Violations provides:

> Except as otherwise provided, the procedure for consideration of alleged violations of part A of subchapter II of this chapter consists of –
>
> (1) counseling as provided in section 1402 of this title;
>
> (2) mediation as provided in section 1403 of this title; and
>
> (3) election, as provided in section 1404 of this title, of either –
>
> (A) a formal complaint and hearing as provided in section 1405 of this title, subject to Board review as provided in section 1406 of this title, and judicial review in the United States Court of Appeals for

> the Federal Circuit as provided in section 1407 of this title, or
>
> (B) a civil action in a district court of the United States as provided in section 1408 of this title. In the case of an employee of the Office of the Architect of the Capitol or of the Capitol Police, the Executive Director, after receiving a request for counseling under section 1402 of this title, may recommend that the employee use the grievance procedures of the Architect of the Capitol or the Capitol Police for resolution of the employee's grievance for a specific period of time, which shall not count against the time available for counseling or mediation.

Should Petitioner have invoked 2 U.S.C. § 1401 and the alternative grievance procedures provided for therein and Respondent AOC have denied Petitioner's request for copies of the Promotion Files and thereafter Petitioner participated in mediation and submitted a subsequent complaint in *Bajbor II*, Respondent Board, by characterizing the actions taken by Respondent AOC as actions taken pursuant to and during the "litigation" of *Bajbor I*, would have dismissed *Bajbor II* for lack of subject matter jurisdiction. This is inconsistent with and contrary to the core objective of Section 2 U.S.C. § 1401: the resolution of disputes alternative to litigation.

The Court cannot help but to recognize the dilemma created by the affirmative defense established by the decision in *Bajbor II*: the CAA, when used in the manner prescribed by Congress, provides no protection from retaliation and reprisal subsequent to the filing of a Request for Counseling. The purported benefits in using the statute are outweighed by the risks resulting to a petitioner from the use of the statute.

Respondent Board, by the affirmative defense established in *Bajbor II*, limits the broad statutory parameters of 2 U.S.C. § 1317(a), eviscerates any reasonable assurance of protection afforded a petitioner who participates under the CAA in general and the Administrative-Judicial Dispute Resolution Procedures of the CAA in particular. The consequential effect of the decision in *Bajbor II* is not to chill but reject the CAA and the purposes for which it was intended; an effect contrary to the intent of Congress and its Contract with America. Respondent Board's decision in *Bajbor II* guts the "protections" provided by 2 U.S.C. § 1317(a) which "protection" is the raison d'etre of 2 U.S.C. § 1317(a).

Respondent Board's decision in *Bajbor II* is a perverse reading of the statute. It is incompatible with the core objective of ensuring protection for participation under the CAA in general and the use of the Administrative-Judicial Dispute Resolution Procedures of the CAA in particular. Respondent Board, by its decision in *Bajbor II*, places its imprimatur on Respondent AOC's engaging in unlawful retaliatory employment practices pursuant to the "litigation" of *Bajbor I*. The inescapable conclusion is that there is no room in the statutory scheme established by Congress for the limitation of subject matter jurisdiction established by the Respondent Board's decision in *Bajbor II*.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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April 25, 2005

NOTE: Pursuant to Fed. Cir. R. 47.6, this disposition is not citable as precedent. It is a public record.

United States Court of Appeals for the Federal Circuit

03-6005, 04-6002

ZIGGY BAJBOR,

Petitioner,

v.

OFFICE OF COMPLIANCE,

Respondent,

and

OFFICE OF THE ARCHITECT OF THE CAPITOL,

Respondent.

JUDGMENT

(Filed Oct. 20, 2004)

ON APPEAL from the Decision of the Board of Directors of the Office of Compliance

In CASE NO(S) 01-AC377(RP)

This CAUSE having been heard and considered, it is ORDERED and ADJUDGED: *AFFIRMED See* Fed. Cir. R. 36

Per Curiam (NEWMAN, LINN, and PROST, *Circuit Judges*).

ENTERED BY ORDER OF THE COURT

DATED: Oct. 20, 2004 /s/ Jan Horbaly [sp]
Jan Horbaly, Clerk

ISSUED AS A MANDATE: Feb. 1, 2005

OFFICE OF COMPLIANCE
Washington, D.C.

ZIGGY BAJBOR Complainant	)	Case No.: 00-AC-105 (AG, RP)
V.	)	
OFFICE OF THE ARCHITECT OF THE CAPITOL Respondent	)	

DECISION AND JUDGMENT

This matter came before the Office of Compliance on allegations of age discrimination, retaliatory employment practices and a hostile work environment in violation of the Congressional Accountability Act of 1995 (*CAA*). §§ 201(a)(2) and 207, 109 Stat. 3, 7 and 13. 2 U.S.C. 1301, 1311 and 1317.

Synopsis of Case

Complainant, Ziggy Bajbor, is an electrical engineer who has been employed by the Office of the Architect of the Capitol (AOC) since March, 1988. He obtained his engineering degrees in Poland, worked in nuclear research in Poland and Sweden for about 14 years and received a professional engineer license in the United States in 1974. He worked in this country as a senior or supervisory engineer in private industry before appointment to his AOC position as a GS-12. He is 74 years old.

Mr. Bajbor believes that he has been denied 3 promotions by the AOC because of his age and has been retaliated

against by the AOC because of his complaint to the Office of Compliance concerning a 1998 promotion opportunity. He is persuaded that he was qualified for each of the promotion opportunities and that the cause of his non-promotion is discrimination.

He alleges that his former supervisor, Vinod Wadwah, was a major factor in the discrimination. He also alleges that the AOC created a hostile work environment and discriminated against him by violations of the Architect of the Capitol Human Resources Act, 40 U.S.C. 166b-7, 108 Stat. 1443 (1994), its letter of commitment to the chairman of the House Office Building Commission on July 5, 1995 and Chapter 335 of its Personnel Manual.

Respondent, the Office of the Architect of the Capitol, identifies Mr. Bajbor as a qualified engineer who works very ably in his preferred field of power systems. The AOC denies any discrimination. It asserts that Mr. Bajbor fails to prove the essential elements of his claim and that only events occurring 180 days prior to December 21, 2000 should be before the Office of Compliance at this time. *CAA*, §402(a).

However, the AOC also offered evidence that at all times it exercised fair managerial judgment in selecting persons who best met the needs of the Office. In the time frame referenced by Mr. Bajbor in his complaint, the AOC selected persons whose interests, experience and managerial skills aided it in providing electrical systems for Congress. Mr. Bajbor had limited experience in many areas of concern to the AOC. Most of his experience with the AOC was in power systems. He viewed them as the more important function for the Engineering Division and preferred work in this area. He did not manage multiple

projects. He also displayed "opinionated," "rigid" behavior with little interest in administrative matters and was often very critical, expressing strong views about the "inferior" qualifications or work of fellow employees and consultants.

Nonetheless, when the AOC had need for Mr. Bajbor's experience and skills within his area, he was promoted to GS-13 to head a new power systems project. This occurred on February 21, 2001.

Issues

The dispositive issue is whether complainant, Ziggy Bajbor, has sustained his legal burdens of proof and persuasion under the *CAA*. He contends, *inter alia*, that he has met the burdens by showing:

- a continuing, discriminatory, retaliatory denial of promotions to GS-13 by the Office of the Architect.
- his age of 74 years and his prior complaint to the Office of Compliance,
- unfair comparison of qualifications between himself and others,
- discriminatory inquiry about age and retirement by a supervisor and
- Respondent's failure to comply with this congressionally imposed duties and its own internal regulations.

These contentions, however, raise other questions including:

- inferences, if any, which may be drawn from events which pre-date the 180 day time-frame under *CAA* §402(a).
- significance, if any, of Respondent's alleged failures to meet Congressional mandates or comply with its own procedures, and
- causal connections, if any, which would establish discrimination under the *CAA*.

Respondent, the Office of the Architect, in its denial of all allegations of discrimination, presents issues involving:

- legitimate management reasons for its personnel actions concerning Mr. Bajbor,
- promotion of Mr. Bajbor to a GS-13 on February 21, 2001 to head a new project requiring his particular skills.
- lack of discriminatory or retaliatory motive.
- absence of "pretext" in its actions and
- jurisdiction over and/or relevance of events before June 24, 2000.

Statement of Proceedings

On December 21, 2000, Ziggy Bajbor sought counseling with the Office of Compliance after learning that the Office of the Architect had not selected him for promotion to a GS-13 for vacancy DE-2000-144 & 144a. The counseling and mediation process ended on October 31, 2001.

On January 28, 2002, Mr. Bajbor filed a formal complaint with the Office of Compliance. The Office of the Architect responded on February 11, 2002. Prehearing discovery was extensive and contentious. In addition,

during evidentiary hearing, Complainant was afforded opportunity to reargue some issues and to subpoena witnesses who might provide foundations or previously denied discovery.

At the evidentiary hearing, which was convened on March 25, 2002, complainant presented 2 witnesses, himself and Joseph Scuderi, his current supervisor. Respondent presented three witnesses. Mr. Scuderi, Linda Anne Poole, acting chief of Employment and Classification and Vinod Wadwah, Mr. Bajbor's prior supervisor. Exhibits including vacancy announcements, applications for vacancies, a chart comparing the experience of vacancy candidates, standards for engineering positions, sections of the AOC personnel manual, E-mail exchanges, Mr. Bajbor's in-grade increases and his publications, copies of Congressional enactments and the classification requests and the evaluation which ultimately resulted in Mr. Bajbor's promotion were received.

The record remained open for the receipt of hearing transcripts and further pleadings by the parties. Each side offered post-trial submissions, which resulted in a correction of the record and the addition of an exhibit. The record remained open until September 16, 2002 when an order closing the record was sent to counsel.

Decision

After considering the evidence and the arguments of counsel, the Hearing Officer finds and concludes that Mr. Bajbor failed to carry his burdens of proof and persuasion on claims of age discrimination, retaliation and hostile work environment. Judgment should be entered for the

Office of the Architect of the Capitol and the complaint should be dismissed.

As is more fully set forth in the findings of fact and conclusions of law, Mr. Bajbor is a qualified engineer, but the AOC had legitimate, managerial reasons for selecting another candidate and not promoting him for the vacancy in December, 1999. These reasons were not pretextual. Indeed, when circumstances arose calling for Mr. Bajbor's special experience and skills, he was promoted. Further, there is no evidence which establishes a work place permeated with abusive behavior of older workers. At best there was a single inquiry or two concerning retirements.

Mr. Bajbor's allegations of the AOC's violations of its Human Resources Act and its personnel manual did not result in either direct or circumstantial evidence of discrimination against Mr. Bajbor under the *CAA*. Neither these alleged violations provide any evidentiary foundation from which reasonable inferences of discrimination under the *CAA* could be drawn. No findings are necessary on the validity of the allegations of statutory and regulatory violations of the AOC. Jurisdiction of the Office of Compliance is limited to violations of the *CAA* and does not extend to other possible causes of action against a government employer.

Finally, it is noted that after evidence was taken in this case, the United States Supreme Court decided *National Railroad Passenger Corp. v. Morgan*, 122 S.Ct. 2061 (2002). Therein the court rejected the "continuing violation" doctrine but did not bar an employee from using prior acts of discrimination as "background." This Hearing Officer, therefore does not strike the evidence concerning alleged prior acts of discrimination, but rather considers it

as context and background in which to evaluate the acts about which timely complaint was made.

Findings of Fact

Ziggy Bajbor, age 74 has been employed by the Office of the Architect of the Capitol (AOC) in the Electrical Engineering Division as an electrical engineer GS-12 since March, 1988. *Transcript of Proceedings*, Vol. 1 (*Tr. I*), 202.

During his 13 years with the AOC, Mr. Bajbor was viewed as an able, qualified engineer and received regular in-grade increases. *Tr. IV*, 566, *Compl. Exs.* 18-20. However, between 1998 and 2000, he did not secure a promotion to GS-13 to which he believed he was entitled. *Tr. I*, 212-221; *Tr. II*, 260; *Compl. Ex.*, 2, 3, 4.

Mr. Bajbor has the basic qualifications for an electrical engineer with the AOC.

a. Mr. Bajbor's education and prior experience are unquestioned. He obtained an engineering degree in Poland, worked for 14 years in Poland and Sweden in nuclear research, received a United States professional engineering license, was employed in the U.S. private sector as a senior supervisory engineer and wrote several scholarly publications. *Tr. I*, 199-201, *Compl. Ex.*, 6-9.

b. Mr. Bajbor has over a decade of credible service with the AOC as an electrical engineer. *Finding 2, supra.*

c. Mr. Bajbor was qualified for the "short-list" of candidates for any GS-13 vacancy for which he applied. *E.g.*: *Tr. IV*, 670-671. He did become a G-13 on February 21, 2001. *Compl. Ex.* 25.

Views differ sharply on whether Mr. Bajbor's particular talent, inclinations and experience qualify him for all types of GS-13 electrical engineering positions with the AOC.

a. Mr. Bajbor believes that he knows the adequacy of his qualifications and performance without reference to "Standards for Professional and Scientific Positions" *Tr. III*, 356. He describes his career with the AOC as one of substantial work in a number of areas of electrical engineering. He identifies "large" projects like IMPACC and his important roles in various projects. *Tr. II*, 203, 211-212, 222-224, 260, 277 and 377

b. The AOC evaluates him as a highly qualified electrical engineer in the area of power systems *TR. IV*, 566. His supervisors, however, document a narrow area of interest.

   He is usually involved in only 10 to 15 AOC engineering projects while about 5 engineers handled the other 220 projects. *Tr. I*, 160, 165 and *Tr. IV*, 601. He does not have extensive experience in electrical subsystems, his experience and interest as primarily in power systems; his administrative supervisory and interpersonal skills are limited *Tr. I*, 113, 116, 122-125, 144; *Tr. III*, 466 and *Tr. IV*, 600, 607, 621, 622, 628, 640.

c. Despite thousands of words on "qualifications," debates on the meaning of "large," "sophisticated systems" and "historical buildings" and comparisons of documents, a clear picture of Mr. Bajbor's limitations in some areas emerges. The AOC is not "degrading" or "smearing" his qualifications as Mr. Bajbor alleges. *Tr. II*, 279. They appear accurate in finding him "opinionated" and "rigid," *Tr. I*, 141.

Denial of Mr. Bajbor's application for promotion on vacancy DE-2000-144 & 144a in December, 1999 was not tainted by age discrimination or retaliatory motive.

a. It is uncontested that Mr. Bajbor had timely notice of the vacancy, filed an application and received the consideration of candidates who meet basic qualifications.

b. Vinod Wadwah and Joseph Scuderi interviewed Mr. Bajbor in the presence of an impartial observer. They used the same questions which had been put to all other candidates. *Tr. I*, 134-139, *Tr. V.*, 750; *Resp, Ex.* 17. They kept notes and made a chart of comparative qualifications of the candidates. *Compl. Ex.* 1.

c. In filling this vacancy, the AOC management was seeking a person who was qualified in and interested in all phases of electrical sub-systems. *Tr. V*, 752-761. The duties in the vacancy notice required performance of a wide range of duties in several sub-systems and required knowledge of the design and operation of sub-systems *Compl. Ex.* 17, *Resp. Ex.* 23 is one illustration of the scope of the need.

d. William Winston was selected for the vacancy. Mr. Bajbor was not

   (1) The reasons for Mr. Winston's selection are articulated in the testimony with detailed comparison of the candidates. *See e.g. Tr. I*, 131-134 and *Tr. V*, 765-767. In summary, Mr. Winston presented a background in many electrical subsystems. Mr. Bajbor with his special interest and experience in power systems did not.

   (2) These reasons given are faithful to AOC's announcement and its goals in filling the vacancy. They are supported by the record which compares the candidates.

e. There is no direct or circumstantial evidence of age bias or retaliation in the selection process.

(1) No questions were asked about age or retaliation. At least one interviewer did not know about Mr. Bajbor's complaint. *Tr. V.*, 770-772, *Resp. Ex.* 16. In addition, the AOC had given its supervisors EEO training and it had EEO policies in place which were communicated to staff. *Tr. IV*, 599 and *TR. V*, 762; *Resp. Ex.* 18.

(2) Within 18 months after this selection process, Mr. Bajbor was promoted to a GS-13 to head a large power systems project. Mr. Wadwah was instrumental in securing the promotion for Mr. Bajbor. It was a promotion which matched the AOC needs with Mr. Bajbor's interests and talents. *Tr. V*, 645, 652-654, *Resp. Exs.* 7 and 9.

f. There is no evidence from which reasonable inferences of discrimination may be drawn in this selection process. At most, Mr. Bajbor and the AOC have different views in the needs of the Office and Mr. Bajbor's skills.

Mr. Bajbor was not subjected to retaliatory employment practices by the AOC.

a. The non-selection of Mr. Bajbor for vacancy DE 2000-144 & 144a. It was based on reasonable appraisal of qualifications and needs of the AOC. *Finding 5, supra.*

b. The contextual or background evidence received concerning events preceding June 24, 2000 do not provide a basis for reasonable inferences of discriminatory or retaliatory action by the AOC.

(1) The non-selection of Mr. Bajbor for vacancy 99-03 occurred in circumstances almost identical to

those found to be non-discriminatory in Finding 5 above. Mr. Bajbor's skills and experience did not match the qualifications of Mr. Scuderi who had experience in many systems, administrative abilities, managerial skills and appeared to Mr. Wadwah to be 90% more qualified in some systems than Mr. Bajbor. *Tr. IV*, 670 *et seq.* and 702.

(2) Mr. Bajbor was not deprived of assignments which might have qualified him for some vacancies. His involvement with power systems to the exclusion of other tasks was of his choosing. *Tr. I*, 122; *Tr. IV*, 625, 640.

The work environment at the AOC was not permeated with discriminatory acts which interfered with Mr. Bajbor's employment.

a. Mr. Wadwah made two inquiries about retirement. *Tr. I*, 208 and 220.

(1) One inquiry was to Mr. Robert Matt who was facing termination of his project and thus his employment with the AOC in about 1995. Mr. Wadwah made inquiry, *Tr. IV*, 659-661. Thereafter, Mr. Wadwah helped Mr. Matt, remain with the AOC until his pension vested. *Tr. IV*, 663-666.

(2) The other inquiry was to Mr. Bajbor. Mr. Wadwah recalls it as casual conversation at the time of various retirement parties. *Tr. IV*, 667. Mr. Bajbor believes that Mr. Wadwah was doing this to see how to play his cards on the up-coming vacancies. *Tr. II*, 317 and 329.

b. There is no evidence of co-worker harassment about age, no bad jokes, hostility based on age directed to Mr. Bajbor. *Tr. II*, 374 and 404-406.

c. Mr. Bajbor's claims of hostile work environment are not founded in fact. They are conjecture and surmise.

(1) Contrary to the facts, Mr. Bajbor concludes that Mr. Matt was being "forced out." He is suspicious about other departures. *Tr. II*, 370-375.

He sees a relationship between a retirement inquiry to him and a vacancy announcement which he did not learn about but which was E-mailed to him. *Tr. II*, 339.

(2) Mr. Bajbor also views the "smearing" of his qualifications in the promotion processes as evidence of a hostile work environment. *Tr. II*, 279.

d. The events described above do not create an atmosphere marked by age discrimination or retaliatory employment practices.

Actions of the AOC concerning Mr. Bajbor were not motivated by age discrimination or retaliation for "protected activities."

a. The AOC consistently tried to obtain an appropriate GS-13 classification for Mr. Bajbor.

(1) Mr. Wadwah commenced efforts to upgrade. Mr. Bajbor and others similarly situated in 1990. His efforts were rejected but were renewed in 1995. *Tr. VI*, 634-637. Moreover, in the mid-1990's Mr. Wadwah secured the conversion of Mr. Bajbor's position from "temporary" to "permanent." *Tr. IV*, 662-663.

(2) When Special Project Engineer, GS-13 positions were created in1998, Mr. Bajbor did not apply for those positions despite E-mail notification. He filed a complaint with the Office of Compliance which was settled. *Tr. II*, 339, *Resp. Ex.* 3.

(3) Even when Mr. Bajbor was suspicious of AOC motivation and made complaints to the Office of Compliance, several of his supervisors were working for his promotion. *E.g. Tr. II*, 349-350 (1998); *Tr. IV*, 645, 662, *Resp. Exs.* 7 and 9.

b. On the occasions when Mr. Bajbor did not receive GS-13 positions for which he applied, there were credible, documented reasons for selecting other candidates who met the needs of the AOC in meeting performing its functions. *Findings 5 and 6, supra.*

c. Evidence of a typographical error in a vacancy announcement, posting of job announcement on an E-mail to persons who do not read E-mail and possible failure of the AOC to comply with some of its statutes and regulations may show failures of a government bureaucracy, but they were not connected by evidence or reason to AOC amicus toward Mr. Bajbor or persons protected under the *C.A.A.* by reason of age or protected activity.

d. The conflict between Mr. Bajbor and his AOC supervisors and their very different judgments about his work and work of the AOC do not permit a factual finding that age discrimination and retaliation resulted.

Conclusions of Law

The Office of Compliance has jurisdiction to hear the allegations of this complaint.

a. Complainant's request for counseling on December 21, 2000 was not premature.

(1) Respondent informed Complainant of his non-selection for GS-13 vacancy DE-2000 144 & 144a on December 13, 2000.

(2) Vacancy DE-2000 144 & 144a was filled by the same person who was selected on or before December 13, 2000 when that person began his duties on or about January 28, 2001.

b. The grant of an extension of time for counseling by the Office of Compliance from January 22, 2001 and June 7, 2001 did not deprive the Office of Compliance of jurisdiction.

(1) Complainant did not receive notification of the end of counseling until June 14, 2001.

(2) §402(b) and 402(c) of the CAA 2 USC 1402(b) and (c) must be read in *pari materia* consistent with the intent of the statute.

c. Allegations in this complaint about events occurring prior to June 21, 2000 are appropriately before the Hearing Office as background. *National Railroad Passenger Corp. v. Morgan*, 122 S.Ct. 2061 (2002).

Complainant does not sustain his burdens of proof and persuasion on his claims of age discrimination, retaliation or hostile work environment in violation of *CAA*.

a. Complainant has not proved age or retaliation as a factor in his non-selection for vacancy DE 2000-144 & 144a.

(1) The credible evidence establishes legitimate and non-discriminatory reasons for selecting a candidate other than Complainant. The AOC needed a person with demonstrated skills in many electrical sub-systems. Complainant was experienced in and focused on power systems because of his interests and views about their importance.

(2) Any possible discriminatory intent in this denial of promotion is outweighed by the AOC record of trying to secure a GS-13 for complainant and its

assistance in achieving a GS-13 position for him on February 21, 2001 without regard to his age or his "protected activity." The February, 2001, promotion was a perfect "match" of Complainant's abilities and the needs of the AOC. It was not a pretext.

b. Complainant does not carry his burden of proving retaliatory employment practices.

(1) The inference of retaliation which might be drawn from the proximity in time between Complainant's "protected activity" and his non-selection is outweighed by substantial evidence of the AOC's efforts to secure a promotion to GS 13 for Complainant and its ultimate success.

(2) Evidence of the "causal connection" between Complainant's non-selection and his "protected activity" is unpersuasive.

(a) Persons who made the selection decision were aware of EEO considerations. Both aver that complainant's application to the Office of Compliance had no part in their decision.

(b) Even while Complainant pursued his second complaint to the Office of Compliance, he was being aided in securing a GS-13 position.

(c) Complainant did not prove the existence of a hostile work environment at the AOC.

(1) Hostile work environment requires proof of sever, threatening and humiliating conduct which interferes with work performance. That proof is not present in this case.

(2) An inquiry or two about retirement plans falls into the legal category of "stray remarks" and the human category of on-the-job chit chat. The inquiries are not persuasive evidence of a hostile work environment. Neither are the Complainant's speculations about reasons for retirements or his suspicions about the retirement inquiry.

Respondent proved legitimate, managerial, non-pretextual reasons for not selecting Complainant for GS-13 vacancies until February 21, 2001.

a. In December 1999 for vacancy DE 2000-144 & 144a, the AOC needed a person with interests and experience in many electric sub-systems. The person selected had the requisite qualifications in several areas. Mr. Bajbor was more one-dimensional.

b. In December 1998 for vacancy DE 99-03, a supervisor with managerial and interpersonal skills was needed. Mr. Bajbor had displayed limited interest in administrative matters and lacked interpersonal skills. Further, he was not as senior in service as the candidate selected.

Judgment

Therefore, it is this 14th day of December 2002,

ORDERED that judgment is entered for the Office of the Architect of the Capitol and it is

FURTHER ORDERED that the complaint filed herein on January 28, 2002 is dismissed with prejudice.

/s/ Sylvia Bacon
SYLVIA BACON
Hearing Officer

CERTIFICATE OF SERVICE

The undersigned employee of the Office of Compliance certify that on the date indicated below served the following Decision and Judgement upon the below named persons, addressed to them at the address indicated.

Jeffrey H. Leib, Esq.
5104 – 34th St., NW
Washington, DC 20008

Via Facsimile

Edgard Martinez, Esq.
Employment Counsel
Office of the Architect
of the Capitol
Ford House Office Building,
Rm. H2-202
Second & D Sts., SW
Washington, DC 20515

Via Facsimile

Signed in Washington, D.C.
this 16th day of December 2002

/s/ Kisha L. Harley
Kisha L. Harley
Hearing Clerk

OFFICE OF COMPLIANCE
LA 200, John Adams Building, 110 Second Street, S.E.
Washington, DC 20540-1999

ZIGGY BAJBOR,	)	
Complainant,	)	
v.	)	**Case No. 00-AC-105 (AG,RP)**
OFFICE OF THE ARCHITECT OF THE CAPITOL	)	**Date: August 11, 2003**
Respondent.	)	

Before the Board of Directors: Susan S. Robfogel, Chair; Barbara L. Camens, Alan V. Friedman; Roberta L. Holzwarth; Barbara Childs Wallace, Members.

DECISION OF THE BOARD OF DIRECTORS

On December 14, 2002, Hearing Officer Sylvia Bacon issued her attached Decision and Judgment dismissing this age discrimination and reprisal complaint on its merits after conducting an evidentiary hearing. The Complainant timely filed a petition for review of the Hearing Officer's decision and a supporting brief. The Respondent employing office filed a brief in opposition to the petition for review.

Upon due consideration of the Hearing Officer's Decision and Judgment, and the parties' filings, the Board affirms the Hearing Officer's dismissal of this complaint. The Board is satisfied that the Hearing Officer's decision is supported by substantial record evidence and that the Hearing Officer employed the correct legal principles and analysis in reaching her result.

For the foregoing reasons, the Hearing Officer's decision dismissing the complaint is **affirmed**.

It is so ordered.

Issued: at Washington, D.C., August 11, 2003.

CERTIFICATE OF SERVICE

I hereby certify that on this 11th day of August 2003, I delivered a copy of this Decision of the Board of Directors to the following parties by the identified means:

First-Class Mail Postage-Prepaid

Jeffrey H. Leib, Esq.
Attorney at Law
5104 34th St., NW
Washington, DC 20008

First-Class Mail Postage-Prepaid
& Facsimile Mail (w/o Hearing Officer Decision)

Edgard Martinez, Esq.
Office of the Architect
of the Capitol
Office of Employment Counsel
Ford House Office Building,
Rm. H2-202
Second & D Sts., SW
Washington, DC 20515

/s/ Kisha L. Harley
Kisha L. Harley
Office of Compliance

OFFICE OF COMPLIANCE
Washington, D.C.

Ziggy Bajbor, Complainant (Employee)	)	
v.	)	Case No. 01-AC-377(RP)
Office Of The Architect Of The Capitol Respondent (Employing Office)	)	

ORDER

This matter comes before the undersigned Hearing Officer on Respondent's Motion to Dismiss/for Summary Judgement, the opposition thereto, and the argument of counsel on the record on this date. For the reasons stated on the record the Motion to Dismiss is granted.

So Ordered
July 26, 2002 /s/ Warren R. King
Date Warren R. King

OFFICE OF COMPLIANCE
LA 200, John Adams Building, 110 Second Street, S.E.
Washington, DC 20540-1999

ZIGGY BAJBOR,	)	
Complainant,	)	
v.	)	**Case No. 01-AC-377(RP)**
OFFICE OF THE ARCHITECT OF THE CAPITOL	)	**Date: May 30, 2003**
Respondent.	)	

Before the Board of Directors: Susan S. Robfogel, Chair; Barbara L. Camens, Alan V. Friedman; Roberta L. Holzwarth; Barbara Childs Wallace, Members.

DECISION OF THE BOARD OF DIRECTORS

I. Introduction

This reprisal case, brought under Section 405 of the Congressional Accountability Act ("the CAA") (2 U.S.C. §1405), is before the Board pursuant to the Complainant Employee's petition for review of the Hearing Officer's dismissal of the complaint on the pleadings. The issue on appeal is whether the alleged Respondent Employer action, denying Complainant's request to inspect two merit promotion vacancy files in reprisal for the Complainant's prior exercise of his rights under the CAA, stated an actionable claim of reprisal. The Complainant requested those files in connection with his pending earlier discrimination complaint before another Hearing Officer. The Hearing Officer in this matter, ruling from the bench, concluded that the alleged Respondent action was not encompassed by the Act's anti-reprisal provision

(Section 207 of the CAA, 2 U.S.C. §1317). The Hearing Officer also concluded that the earlier case Hearing Officer's discovery ruling precluded a collateral challenge to that action in this subsequent case.

While we affirm the Hearing Officer's dismissal of the Complaint, we do so solely on the basis that sound policy and judicial economy dictate that the Complainant pursue his discovery connected claim in the earlier Office of Compliance proceeding in which it arose. In the particular facts of this case, we hold that the Architect's denial of Complainant's document request, requiring him to obtain it in the discovery process, does not create an independent retaliation claim. We do not adopt the Hearing Officer's interpretation regarding the protective scope of Section 207 of the CAA ("Section 207"), nor do we decide whether the subject denial of merit promotion files could constitute an actionable retaliation claim if it occurred outside of the CAA dispute resolution process. We reserve ruling on these questions until an appropriate case arises in the future.

II. Statement of the Case.

A. Background[1]

The Complainant, in connection with his earlier age discrimination complaint[2] before the Office of Compliance,

---

[1] Inasmuch as this appeal arose from a complaint dismissal the Board shall accept as true all well-pleaded factual complaint allegations and draw all reasonable inferences in the Complainant's favor. *H.J. Inc. Northwest Bell Telephone Co.*, 492 U.S. 229, 249-50 (1989); *Conley v. Gibson*, 355 U.S. [41] (1957); and *In re Burlington Coat Factory Sec. Litig.*, 114 F.3d 1410, 1424-25 (3d Cir. 1997).

[2] The pleadings disclose that the Complainant had initiated even earlier proceedings against the Architect.

requested from the Respondent ("the Architect") inspection of two vacancy merit promotion files ("the Files"). The Complainant sought those Files to prepare for the prosecution of his complaint before a CAA hearing officer. Ostensibly, the Files could have informed the Complainant regarding the regularity of the promotion process and how his qualifications compared with those of his more successful competitors.

When the Architect did not respond to the Complainant's request, he sought the Files through discovery. Hearing Officer Sylvia Bacon examined the files *in camera* and released them to the Complainant in redacted form.[3]

The Complainant alleges, in this separate and subsequent reprisal complaint, that the Architect did not voluntarily provide him with the Files in accord with its regulations; and, instead, required him to expend time and expense to acquire the Files through discovery: in reprisal for his filing of complaints under the CAA.

B. Hearing Officer's Decision

After reviewing written briefs, and hearing oral argument, Hearing Officer Warren King dismissed the complaint on the record (Hearing Tr. Pp.38-40). The Hearing Officer held that "[T]he case law is such that the conduct that must be shown to be an adverse action must be more severe than that which is shown here. . . . I'm satisfied that under the case law that a denial of the promotion file

[3] Ultimately, that Hearing Officer ruled for the Architect on the merits. Complainant has petitioned for review of that decision and that appeal before the Board is in the briefing period.

does not rise to the level of an adverse action within the meaning of that term as defined by dozens and dozens of courts."

The Hearing Officer relied upon the D.C. Circuit's unpublished *Heamstead*[4] decision "and dozens of other cases that stand for the same proposition" in deciding that this complaint did not fall within the scope of the CAA anti-reprisal protections.

The Hearing Officer also opined that this complaint might be misdirected because any issue regarding the Complainant's entitlement to inspect the Files had been decided by Hearing Officer Bacon in Complainant's underlying age discrimination complaint case, and that her decision to redact the Files could be raised before the Board in the appellate stage of that case.

III. Positions of the Parties

A. Appellant/Complainant

Counsel acknowledged to the Hearing Officer that the Complainant would not have plead an actionable reprisal claim under Title VII or the Age Discrimination in Employment Act ("ADEA") because those statutes' interpretative case law requires that a reprisal action be more adverse than that herein so as to be actionable. However, the Complainant submits that the CAA's anti-reprisal provision is much broader than are its Title VII and ADEA counterparts and he points out that Section 201 of the CAA (2 U.S.C. §1311) mandates that "All personnel

[4] *David Heamstead* v. *Office of the Architect of the Capitol*, 2002 U.S. App. LEXIS 11366 (D.C. Cir., 04/22/2002).

actions affecting covered employees shall be made free from any discrimination . . . ". The Complainant urges the Board not to follow *Heamstead* and related judicial precedent because they were wrongly decided in failing to consider the CAA's uniquely expansive anti-reprisal provision. Complainant contends that the CAA proscribes management action attributed to retaliatory motivation and asks the Board to be guided by National Labor Relations Board precedent in assessing what alleged reprisals may be entertained under a reprisal claim.

Complainant asserts that the Architect's refusal to respond and voluntarily provide him with the requested merit promotion files did constitute an adverse action against him because it impeded his ability to ascertain whether he had a cause of action and whether the merits of that cause warranted further pursuit.[5] Therefore, Hearing Officer Bacon's discovery ruling in his underlying age discrimination complaint case, Complainant argues, is not dispositive of this case.

B. Appellee/Architect

The Complainant failed to allege that he suffered any change in the terms and conditions of his employment because the Architect denied him access to the Files. Further, Hearing Officer Bacon's discovery ruling on the Files is preclusive in this proceeding.

The *Heamstead* case, *supra*, is controlling because the Court of Appeals for the District of Columbia affirmed a

[5] Complainant plead that he was entitled to the Files as a matter of right pursuant to the Architect's merit promotion regulation (Chapter 335).

district court's dismissal of a complaint against the Architect involving an identical CAA reprisal allegation. The appellate court concluded that the Files denial to the employee fell below the legal standard required to be an "adverse personnel action" because it is neither *severe* or *pervasive* enough to qualify as a basis for supporting a Title VII retaliation claim; and no evidence was presented to the court showing that the employee suffered from any negative employment consequences based on his exercise of protected activity.

IV. Analysis and Conclusions

Just as in an earlier case[6] The Board chooses to decide this matter on a dispositive ground not requiring it to define the scope of Section 207 protections. We affirm the dismissal of this complaint on policy and judicial economy grounds drawn from the spirit of the issue preclusion doctrines of collateral estoppel and res judicata. While a final decision has not yet been rendered in the Complainant's underlying discrimination case we believe that litigation of his document access claims should be restricted to that proceeding in which they arose.

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[6] In *Lawrence Hatcher v. Office of the Architect of the Capitol*, Case No. 96-AC-15(CV, RP), 02/18/1998, a prior Board elected not to rest its decision upon a hearing officer's finding that an alleged retaliatory transfer from one position to another did not constitute an actionable adverse action. Instead, the Board affirmed the hearing officer's merits finding that no motive of reprisal caused the transfer.

A. Collateral Estoppel

The Complainant sought the Files in relation to his earlier age discrimination non-promotion complaint pending before CAA Hearing Officer Sylvia Bacon. Respondent required the Complainant to seek the Files through pre-hearing discovery by declining to release them voluntarily. Hearing Officer Bacon, after an *in camera* examination, ordered the Files released in redacted form. The Respondent complied. Complainant filed this complaint, alleging that the Respondent engaged in retaliation by not voluntarily releasing the Files.

Section 406(e) & (f) of the CAA (*2 U.S.C. §1405(e) & (f)*) provides for discovery in these proceedings, subject to a hearing officer's determinations on objections to the production of subpoenaed testimonial and documentary evidence. The Office's Procedural Rules, at *Subpart f*, prescribe the discovery process. The Procedural Rules broadly authorize a hearing officer to impose sanctions (*§7.02*) on any party, including, but not limited to, the payment of attorney's fees and reasonable expense, for failure to comply with a discovery order.

We, therefore, believe that the Complainant's exclusive avenue for redress regarding his document request was in that very underlying proceeding. The Complaint was at liberty to request that the hearing officer impose sanctions on the Respondent if he felt that the Respondent's discovery position or actions so warranted. Further, the hearing officer's rulings in such a request would have been appeasable to the Board.

The compelling interests of judicial economy and case or issue finality are effected through the reclusive legal doctrines of *res judicata* and *collateral estoppel*. In a

generic sense *res judicata* bars a second suit if: (1) there is an identity of parties (or their privies); (2) there has been an earlier final judgment on the merits of a claim; and (3) the second claim is based on the same set of transactional facts as the first. Under the doctrine of *collateral estoppel*, when the second action is predicated upon a different cause of action, the judgment in the prior suit precludes relitigation of issues actually litigated and necessary to the outcome of the first action. See, *International Air Response v. United States*, 2003 U.S. App. LEXIS 6552 (Fed. Cir. 4/07/2003); *Oakerlee Fernandez v. Office of Personnel Management*, 2003 U.S. App. LEXIS 434 (Fed. Cir. 01/08/2003). Preclusion law is designed to protect litigants,[7] and the courts,[8] from the burdens of duplicative litigation.

In the underlying proceeding, and this complaint case, the parties are identical. The Complainant litigated, through discovery, his demand for the Files in the underlying case. That hearing officer ruled by releasing redacted files to the Complainant. This complaint, in essence, is the Complainant's challenge to the Respondent's litigating tactics in the underlying case.

We hold, under policies favoring judicial economy and discouraging duplicative litigation, that the Complainant's exclusive avenue for redress of this claim was before Hearing Officer Bacon and the Board in the underlying case. He may not resurface it as an independent claim of retaliation through this, a new complaint.

---

[7] See generally, *Parklane Hosier Co. v. Shore*, 439 U.S. 322, 326 (1979) (preclusion protects litigants from the burden of relitigating issues already decided).

[8] *Id.* at 326 (preclusion promotes judicial economy).

ORDER

Pursuant to Section 406(e) of the Congressional Accountability Act and Section 8.01(d) of the Office's Procedural Rules, the Board affirms the Hearing Officer's dismissal of the complaint, but for the reasons stated in this opinion.

It is so ordered

_____
Susan S. Robfogel, Chair

_____
Barbara L. Camens, Member

_____
Alan V. Friedman, Member

_____
Roberta L. Holzwarth, Member

_____
Barbara Childs Wallace, Member

Issued, Washington, D.C.: May 30, 2003

CERTIFICATE OF SERVICE

I hereby certify that on this 30th day of May 2003, I delivered a copy of this Decision of the Board of Directors to the following parties by the below identified means:

First-Class Mail Postage-Prepaid

Jeffrey H. Leib, Esq.
Attorney at Law
5104 34th Street, N.W.
Washington, D.C. 20008

First-Class Mail Postage-Prepaid & Facsimile Mail (w/o Hearing Officer Decision)

Edgard Martinez, Esq.
Office of Architect of the Capitol
Office of Employment Counsel
Ford House Building, Room H2-202
Washington, D.C. 20515

/s/ Kisha L. Harley
Kisha L. Harley
Office of Compliance

United States Court of Appeals
for the Federal Circuit

ORDER

(Filed Jan. 26, 2005)

A combined petition for panel rehearing and for rehearing en banc having been filed by the PETITIONER, and the petition for rehearing having been referred to the panel that heard the appeal, and thereafter the petition for rehearing en banc having been referred to the circuit judges who are in regular active service,

UPON CONSIDERATION THEREOF, it is

ORDERED that the petition for panel rehearing be, and the same hereby is, DENIED and it is further

ORDERED that the petition for rehearing en banc be, and the same hereby is, DENIED,

The mandate of the court will issue on February 1, 2005.

For the Court,

/s/ Jan Horbaly
Jan Horbaly
Clerk

Dated: January 25, 2005

cc: Jeffrey H. Leib
Peter A. Eveleth, Matthew M. Collette

BAJBOR V OOC, 03-6005, 04-6002
(PERS – 01-AC-377 (RP))

* *
* Note: Pursuant to Fed. Cir. R. 47.6, this order *
* is not citable as precedent. It is a public record. *
* *

UNITED STATES CODE
CONGRESSIONAL ACCOUNTABILITY ACT
2 U.S.C. 1301 *et seq.*

Section 1302. Application of laws

(a) Laws made applicable

The following laws shall apply, as prescribed by this chapter, to the legislative branch of the Federal Government:

(1) The Fair Labor Standards Act of 1938 (29 U.S.C. 201 et seq.).

(2) Title VII of the Civil Rights Act of 1964 (42 U.S.C. 2000e et seq.).

(3) The Americans with Disabilities Act of 1990 (42 U.S.C. 2101 et seq.).

(4) The Age Discrimination in Employment Act of 1967 (29 U.S.C. 621 et seq.).

(5) The Family and Medical Leave Act of 1993 (29 U.S.C. 2611 et seq.).

(6) The Occupational Safety and Health Act of 1970 (29 U.S.C. 651 et seq.).

(7) Chapter 71 (relating to Federal service labor-management relations) of title 5.

(8) The Employee Polygraph Protection Act of 1988 (29 U.S.C. 2001 et seq.).

(9) The Worker Adjustment and Retraining Notification Act (29 U.S.C. 2101 et seq.).

(10) The Rehabilitation Act of 1973 (29 U.S.C. 701 et seq.).

(11) Chapter 43 (relating to veterans' employment and reemployment) of title 38. * * *

(b) Laws which may be made applicable

(1) In general

The Board shall review provisions of Federal law (including regulations) relating to (A) the terms and conditions of employment (including hiring, promotion, demotion, termination, salary, wages, overtime compensation, benefits, work assignments or reassignments, grievance and disciplinary procedures, protection from discrimination in personnel actions, occupational health and safety, and family and medical and other leave) of employees, and (B) access to public services and accommodations.

(2) Board report

Beginning on December 31, 1996, and every 2 years thereafter, the Board shall report on (A) whether or to what degree the provisions described in paragraph (1) are applicable or inapplicable to the legislative branch, and (B) with respect to provisions inapplicable to the legislative branch, whether such provisions should be made applicable to the legislative branch. The presiding officers of the House of Representatives and the Senate shall cause each such report to be printed in the Congressional Record and each such report shall be referred to the committees of the House of Representatives and the Senate with jurisdiction.

(3) Reports of congressional committees

Each report accompanying any bill or joint resolution relating to terms and conditions of employment or access to public services or accommodations reported by a committee of the House of Representatives or the Senate shall –

(A) describe the manner in which the provisions of the bill or joint resolution apply to the legislative branch; or

(B) in the case of a provision not applicable to the legislative branch, include a statement of the reasons the provision does not apply.

On the objection of any Member, it shall not be in order for the Senate or the House of Representatives to consider any such bill or joint resolution if the report of the committee on such bill or joint resolution does not comply with the provisions of this paragraph. This paragraph may be waived in either House by majority vote of that House.

* * *

Section 1311. Rights and protections under title VII of Civil Rights Act of 1964, Age Discrimination in Employment Act of 1967, Rehabilitation Act of 1973, and title I of Americans with Disabilities Act of 1990

(a) Discriminatory practices prohibited

All personnel actions affecting covered employees shall be made free from any discrimination based on –

(1) race, color, religion, sex, or national origin, within the meaning of section 703 of the Civil Rights Act of 1964 (42 U.S.C. 2000e-2);

(2) age, within the meaning of section 15 of the Age Discrimination in Employment Act of 1967 (29 U.S.C. 633a); or

(3) disability, within the meaning of section 501 of the Rehabilitation Act of 1973 (29 U.S.C. 791) and sections 102 through 104 of the Americans with Disabilities Act of 1990 (42 U.S.C. 12112-12114).

(b) Remedy

(1) Civil rights

The remedy for a violation of subsection (a)(1) of this section shall be –

(A) such remedy as would be appropriate if awarded under section 706(g) of the Civil Rights Act of 1964 (42 U.S.C. 2000e-5(g)); and

(B) such compensatory damages as would be appropriate if awarded under section 1981 of title 42, or as would be appropriate if awarded under sections 1981a(a)(1), 1981a(b)(2), and, irrespective of the size of the employing office, 1981a(b)(3)(D) of title 42.

(2) Age discrimination

The remedy for a violation of subsection (a)(2) of this section shall be –

(A) such remedy as would be appropriate if awarded under section 15(c) of the Age Discrimination in Employment Act of 1967 (29 U.S.C. 633a(c)); and

(B) such liquidated damages as would be appropriate if awarded under section 7(b) of such Act (29 U.S.C. 626(b)).

In addition, the waiver provisions of section 7(f) of such Act (29 U.S.C. 626(f)) shall apply to covered employees.

(3) Disabilities discrimination

The remedy for a violation of subsection (a)(3) of this section shall be –

(A) such remedy as would be appropriate if awarded under section 505(a)(1) of the Rehabilitation Act of 1973 (29 U.S.C. 794a(a)(1)) or section 107(a) of the Americans with Disabilities Act of 1990 (42 U.S.C. 12117(a)); and

(B) such compensatory damages as would be appropriate if awarded under sections 1981a(a)(2), 1981a(a)(3), 1981a(b)(2), and, irrespective of the size of the employing office, 1981a(b)(3)(D) of title 42.

(c) Omitted

(d) Effective date

This section shall take effect 1 year after January 23, 1995.

Section 1312. Rights and protections under Family and Medical Leave Act of 1993

* * *

(d) Regulations.

(1) In General.

The Board shall, pursuant to section 1384 of this title, issue regulations to implement the rights and protections under this section.

(2) Agency Regulations.

The regulations issued under paragraph (1) shall be the same as substantive regulations promulgated by the Secretary of Labor to implement the statutory provisions referred to in subsection (a) of this section except insofar as the Board may determine, for good cause shown and stated together with the regulation, that a modification of such regulations would be more effective for the implementation of the rights and protections under this section.

Section 1313. Rights and protections under Fair Labor Standards Act of 1938

* * *

(c) Regulations to Implement Section.

(1) In General.

The Board shall, pursuant to section 1384 of this title, issue regulations to implement this section.

(2) Agency Regulations.

Except as provided in paragraph (3), the regulations issued under paragraph (1) shall be the same as substantive regulations promulgated by the Secretary of Labor to implement the statutory provisions referred to in subsection (a) of this section except insofar as the Board may determine, for good cause shown and stated together with the regulation, that a modification of such regulations would be more effective for the implementation of the rights and protections under this section.

Section 1314. Rights and protections under Employee Polygraph Protection Act of 1988

* * *

(c) Regulations to Implement Section.

(1) In General.

The Board shall, pursuant to section 1384 of this title, issue regulations to implement this section.

(2) Agency Regulations.

The regulations issued under paragraph (1) shall be the same as substantive regulations promulgated by the Secretary of Labor to implement the statutory provisions referred to in subsections (a) and (b) of this section except insofar as the Board may determine, for good cause shown and stated together with the regulation, that a modification of such regulations would be more effective for the implementation of the rights and protections under this section.

Section 1315. Rights and protections under Worker Adjustment and Retraining Notification Act

* * *

(c) Regulations to Implement Section.

(1) In General.

The Board shall, pursuant to section 1384 of this title, issue regulations to implement this section.

(2) Agency Regulations.

The regulations issued under paragraph (1) shall be the same as substantive regulations promulgated by the Secretary of Labor to implement the statutory provisions referred to in subsection (a) of this section except insofar as the Board may

determine, for good cause shown and stated together with the regulation, that a modification of such regulations would be more effective for the implementation of the rights and protections under this section.

Section 1316. Rights and protections relating to veterans' employment and reemployment

* * *

(c) Regulations to Implement Section.

(1) In General.

The Board shall, pursuant to section 1384 of this title, issue regulations to implement this section.

(2) Agency Regulations.

The regulations issued under paragraph (1) shall be the same as substantive regulations promulgated by the Secretary of Labor to implement the statutory provisions referred to in subsection (a) of this section except to the extent that the Board may determine, for good cause shown and stated together with the regulation, that a modification of such regulations would be more effective for the implementation of the rights and protections under this section.

Section 1317. Prohibition of Intimidation or Reprisal

(a) In General.

It shall be unlawful for an employing office to intimidate, take reprisal against, or otherwise discriminate against, any covered employee because the covered employee has opposed any practice made unlawful by this chapter, or because the covered employee has initiated proceedings, made

a charge, or testified, assisted, or participated in any manner in a hearing or other proceeding under this chapter.

(b) Remedy.

The remedy available for a violation of subsection (a) of this section shall be such legal or equitable remedy as may be appropriate to redress a violation of subsection (a) of this section.

Section 1331. Rights and protections under Americans with Disabilities Act of 1990 relating to public services and accommodations; procedures for remedy of violations

* * *

(e) Regulations to Implement Section.

(1) In General.

The Board shall, pursuant to section 1384 of this title, issue regulations to implement this section.

(2) Agency regulations

The regulations issued under paragraph (1) shall be the same as substantive regulations promulgated by the Attorney General and the Secretary of Transportation to implement the statutory provisions referred to in subsection (b) of this section except to the extent that the Board may determine, for good cause shown and stated together with the regulation, that a modification of such regulations would be more effective for the implementation of the rights and protections under this section.

Section 1341. Rights and protections under Occupational Safety and Health Act of 1970; procedures for remedy of violations

* * *

(d) Regulations to Implement Section.

(1) In General.

The Board shall, pursuant to section 1384 of this title, issue regulations to implement this section.

(2) Agency Regulations.

The regulations issued under paragraph (1) shall be the same as substantive regulations promulgated by the Secretary of Labor to implement the statutory provisions referred to in subsection (a) of this section except to the extent that the Board may determine, for good cause shown and stated together with the regulation, that a modification of such regulations would be more effective for the implementation of the rights and protections under this section.

Section 1351. Application of chapter 71 of title 5 relating to Federal service labor-management relations; procedures for remedy of violations

* * *

(d) Regulations to Implement Section.

(1) In General.

The Board shall, pursuant to section 1384 of this title, issue regulations to implement this section.

(2) Agency Regulations.

Except as provided in subsection (e) of this section, the regulations issued under paragraph (1) shall be the same as substantive regulations promulgated by the Federal Labor Relations Authority to implement the statutory provisions referred to in subsection (a) of this section except –

(A) to the extent that the Board may determine, for good cause shown and stated together with the regulation, that a modification of such regulations would be more effective for the implementation of the rights and protections under this section; or

(B) as the Board deems necessary to avoid a conflict of interest or appearance of a conflict of interest.

(e) Specific regulations regarding application to certain offices of Congress

(1) Regulations Required.

The Board shall issue regulations pursuant to section 1384 of this title on the manner and extent to which the requirements and exemptions of chapter 71 of title 5 should apply to covered employees who are employed in the offices listed in paragraph

(2) The regulations shall, to the greatest extent practicable, be consistent with the provisions and purposes of chapter 71 of title 5 and of this chapter, and shall be the same as substantive regulations issued by the Federal Labor Relations Authority under chapter 71 of title 5, except –

(A) to the extent that the Board may determine, for good cause shown and stated together with the regulation, that a modification of such

regulations would be more effective for the implementation of the rights and protections under this section; and

(B) that the Board shall exclude from coverage under this section any covered employees who are employed in offices listed in paragraph (2) if the Board determines that such exclusion is required because of –

(i) a conflict of interest or appearance of a conflict of interest; or

(ii) Congress' constitutional responsibilities.

(2) Offices referred to

The offices referred to in paragraph (1) include –

(A) the personal office of any Member of the House of Representatives or of any Senator;

(B) a standing, select, special, permanent, temporary, or other committee of the Senate or House of Representatives, or a joint committee of Congress;

(C) the Office of the Vice President (as President of the Senate), the Office of the President pro tempore of the Senate, the Office of the Majority Leader of the Senate, the Office of the Minority Leader of the Senate, the Office of the Majority Whip of the Senate, the Office of the Minority Whip of the Senate, the Conference of the Majority of the Senate, the Conference of the Minority of the Senate, the Office of the Secretary of the Conference of the Majority of the Senate, the Office of the Secretary of the Conference of the Minority of the Senate, the Office of the Secretary for the Majority of the Senate, the Office of the Secretary for the Minority of the Senate, the Majority Policy Committee of the Senate,

the Minority Policy Committee of the Senate, and the following offices within the Office of the Secretary of the Senate:

Offices of the Parliamentarian, Bill Clerk, Legislative Clerk, Journal Clerk, Executive Clerk, Enrolling Clerk, Official Reporters of Debate, Daily Digest, Printing Services, Captioning Services, and Senate Chief Counsel for Employment;

(D) the Office of the Speaker of the House of Representatives, the Office of the Majority Leader of the House of Representatives, the Office of the Minority Leader of the House of Representatives, the Offices of the Chief Deputy Majority Whips, the Offices of the Chief Deputy Minority Whips and the following offices within the Office of the Clerk of the House of Representatives: Offices of Legislative Operations, Official Reporters of Debate, Official Reporters to Committees, Printing Services, and Legislative Information;

(E) the Office of the Legislative Counsel of the Senate, the Office of the Senate Legal Counsel, the Office of the Legislative Counsel of the House of Representatives, the Office of the General Counsel of the House of Representatives, the Office of the Parliamentarian of the House of Representatives, and the Office of the Law Revision Counsel;

(F) the offices of any caucus or party organization;

(G) the Congressional Budget Office, the Office of Technology Assessment, and the Office of Compliance; and

(H) such other offices that perform comparable functions which are identified under regulations of the Board.

Section 1384. Substantive Regulations.

a) Regulations.

(1) In General. The procedures applicable to the regulations of the Board issued for the implementation of this chapter, which shall include regulations the Board is required to issue under subchapter II of this chapter (including regulations on the appropriate application of exemptions under the laws made applicable in subchapter II of this chapter) are as prescribed in this section.

(2) Rulemaking Procedure – Such regulations of the Board –

(A) shall be adopted, approved, and issued in accordance with subsection (b) of this section; and

(B) shall consist of 3 separate bodies of regulations, which shall apply, respectively, to –

(i) the Senate and employees of the Senate;

(ii) the House of Representatives and employees of the House of Representatives; and

(iii) all other covered employees and employing offices.

b) Adoption by the Board. The Board shall adopt the regulations referred to in subsection (a)(1)

of this section in accordance with the principles and procedures set forth in section 553 of title 5 and as provided in the following provisions of this subsection:

(1) Proposal. The Board shall publish a general notice of proposed rulemaking under section 553(b) of title 5, but, instead of publication of a

general notice of proposed rulemaking in the Federal Register, the Board shall transmit such notice to the Speaker of the House of Representatives and the President pro tempore of the Senate for publication in the Congressional Record on the first day on which both Houses are in session following such transmittal. Such notice shall set forth the recommendations of the Deputy Director for the Senate in regard to regulations under subsection(a)(2)(B)(i) of this section, the recommendations of the Deputy Director for the House of Representatives in regard to regulations under subsection (a)(2)(B)(ii) of this section, and the recommendations of the Executive Director for regulations under subsection (a)(2)(B)(iii) of this section.

(2) Comment. Before adopting regulations, the Board shall provide a comment period of at least 30 days after publication of a general notice of proposed rulemaking.

(3) Adoption. After considering comments, the Board shall adopt regulations and shall transmit notice of such action together with a copy of such regulations to the Speaker of the House of Representatives and the President pro tempore of the Senate for publication in the Congressional Record on the first day on which both Houses are in session following such transmittal.

(4) Recommendation as to method of approval.

The Board shall include a recommendation in the general notice of proposed rulemaking and in the regulations as to whether the regulations should be approved by resolution of the Senate, by resolution of the House of Representatives, by concurrent resolution, or by joint resolution.

(c) Approval of Regulations.

(1) In General. Regulations referred to in paragraph (2)(B)(i) of subsection (a) of this section may be approved by the Senate by resolution or by the Congress by concurrent resolution or by joint resolution. Regulations referred to in paragraph (2)(B)(ii) of subsection (a) of this section may be approved by the House of Representatives by resolution or by the Congress by concurrent resolution or by joint resolution. Regulations referred to in paragraph (2)(B)(iii) may be approved by Congress by concurrent resolution or by joint resolution.

(2) Referral. Upon receipt of a notice of adoption of regulations under subsection (b)(3) of this section, the presiding officers of the House of Representatives and the Senate shall refer such notice, together with a copy of such regulations, to the appropriate committee or committees of the House of Representatives and of the Senate. The purpose of the referral shall be to consider whether such regulations should be approved, and, if so, whether such approval should be by resolution of the House of Representatives or of the Senate, by concurrent resolution or by joint resolution.

(3) Joint Referral and Discharge in the Senate.

The presiding officer of the Senate may refer the notice of issuance of regulations, or any resolution of approval of regulations, to one committee or jointly to more than one committee. If a committee of the Senate acts to report a jointly referred measure, any other committee of the Senate must act within 30 calendar days of continuous session, or be automatically discharged.

(4) One-House Resolution or Concurrent Resolution.

In the case of a resolution of the House of Representatives or the Senate or a concurrent resolution referred to in paragraph (1), the matter after the resolving clause shall be the following:

"The following regulations issued by the Office of Compliance on ___ are hereby approved:" (the blank space being appropriately filled in, and the text of the regulations being set forth).

(5) Joint Resolution.

In the case of a joint resolution referred to in paragraph (1), the matter after the resolving clause shall be the following:

"The following regulations issued by the Office of Compliance on ___ are hereby approved and shall have the force and effect of law:" (the blank space being appropriately filled in, and the text of the regulations being set forth).

(d) Issuance and Effective Date.

(1) Publication. After approval of regulations under subsection (c) of this section, the Board shall submit the regulations to the Speaker of the House of Representatives and the President pro tempore of the Senate for publication in the Congressional Record on the first day on which both Houses are in session following such transmittal.

(2) Date of Issuance. The date of issuance of regulations shall be the date on which they are published in the Congressional Record under paragraph (1).

(3) Effective Date. Regulations shall become effective not less than 60 days after the regulations are issued, except that the Board may provide for

an earlier effective date for good cause found (within the meaning of section 553(d)(3) of title 5 and published with the regulation.

(e) Amendment of Regulations. Regulations may be amended in the same manner as is described in this section for the adoption, approval, and issuance of regulations, except that the Board may, in its discretion, dispense with publication of a general notice of proposed rulemaking of minor, technical, or urgent amendments that satisfy the criteria for dispensing with publication of such notice pursuant to section 553(b)(B) of title 5.

(f) Right to Petitioner for Rulemaking. Any interested party may petition to the Board for the issuance, amendment, or repeal of a regulation.

(g) Consultation. The Executive Director, the Deputy Directors, and the Board –

(1) shall consult, with regard to the development of regulations, with –

(A) the Chair of the Administrative Conference of the United States;

(B) the Secretary of Labor;

(C) the Federal Labor Relations Authority; and

(D) the Director of the Office of Personnel Management; and

(2) may consult with any other persons with whom consultation, in the opinion of the Board, the Executive Director, or Deputy Directors, may be helpful.

* * *

Section 1401. Procedure for consideration of alleged violations

Except as otherwise provided, the procedure for consideration of alleged violations of part A of subchapter II of this chapter consists of –

(1) counseling as provided in section 1402 of this title;

(2) mediation as provided in section 1403 of this title; and

(3) election, as provided in section 1404 of this title, of either –

(A) a formal complaint and hearing as provided in section 1405 of this title, subject to Board review as provided in section 1406 of this title, and judicial review in the United States Court of Appeals for the Federal Circuit as provided in section 1407 of this title, or

(B) a civil action in a district court of the United States as provided in section 1408 of this title.

In the case of an employee of the Office of the Architect of the Capitol or of the Capitol Police, the Executive Director, after receiving a request for counseling under section 1402 of this title, may recommend that the employee use the grievance procedures of the Architect of the Capitol or the Capitol Police for resolution of the employee's grievance for a specific period of time, which shall not count against the time available for counseling or mediation.

Section 1402. Counseling

(a) In General.

To commence a proceeding, a covered employee alleging a violation of a law made applicable under Part A of title II shall request counseling by the Office. The Office shall provide the employee with all relevant information with respect to the rights of the employee. A request for counseling shall be made not later than 180 days after the date of the alleged violation.

(b) Period of Counseling.

The period of counseling shall be 30 days unless the employee and the Office agree to reduced the period. The period shall begin on the date the request for counseling is received.

(c) Notification of end of counseling period.

The Office shall notify the employee in writing when the counseling period has ended.

Section 1403. Mediation

(a) Initiation.

Not later than 15 days after receipt by the employee of notice of the end of the counseling period under section 1402, but prior to and as a condition of making an election under section 1404, the covered employee who alleged a violation of a law shall file a request for mediation with the Office.

(b) Process

Mediation under this section –

(1) may include the Office, the covered employee, the employing office, and one or more

individuals appointed by the Executive Director after considering recommendations by organizations composed primarily of individuals experienced in adjudicating or arbitrating personnel matters, and

(2) shall involve meetings with the parties separately or jointly for the purpose of resolving the dispute between the covered employee and the employing office.

(c) Mediation period.

The mediation period shall be 30 days beginning on the date the request for mediation is received. The mediation period may be extended for additional periods at the joint request of the covered employee and the employing office. The Office shall notify in writing the covered employee and the employing office when the mediation period has ended.

(d) Independence of mediation process.

No individual, who is appointed by the Executive Director to mediate, may conduct or aid in a hearing conducted under section 1405 with respect to the same matter or shall be subject to subpoena or any other compulsory process with respect to the same matter.

Section 1404. Election of proceeding

Not later than 90 days after a covered employee receives notices of the end of the period of mediation, but no sooner than 30 days after receipt of such notification, such covered employee may either –

(1) file a complaint with the Office in accordance with section 1405, or

(2) file a civil action in accordance with section 1408 in the United States District Court for the district in which the employee is employed or for the District of Columbia.

Section 1405. Complaint and hearing

(a) In general

A covered employee may, upon the completion of mediation under section 1403 of this title, file a complaint with the Office. The respondent to the complaint shall be the employing office –

(1) involved in the violation, or

(2) in which the violation is alleged to have occurred, and about which mediation was conducted.

(b) Dismissal

A hearing officer may dismiss any claim that the hearing officer finds to be frivolous or that fails to state a claim upon which relief may be granted.

(c) Hearing officer

(1) Appointment

Upon the filing of a complaint, the Executive Director shall appoint an independent hearing officer to consider the complaint and render a decision. No Member of the House of Representatives, Senator, officer of either the House of Representatives or the Senate, head of an employing office, member of the Board, or covered employee may be appointed to be a hearing officer. The Executive

Director shall select hearing officers on a rotational or random basis from the lists developed under paragraph (2). Nothing in this section shall prevent the appointment of hearing officers as full-time employees of the Office or the selection of hearing officers on the basis of specialized expertise needed for particular matters.

(2) Lists

The Executive Director shall develop master lists, composed of –

(A) members of the bar of a State or the District of Columbia and retired judges of the United States courts who are experienced in adjudicating or arbitrating the kinds of personnel and other matters for which hearings may be held under this chapter, and (B) individuals expert in technical matters relating to accessibility and usability by persons with disabilities or technical matters relating to occupational safety and health. In developing lists, the Executive Director shall consider candidates recommended by the Federal Mediation and Conciliation Service or the Administrative Conference of the United States.

(d) Hearing

Unless a complaint is dismissed before a hearing, a hearing shall be –

(1) conducted in closed session on the record by the hearing officer;

(2) commenced no later than 60 days after filing of the complaint under subsection (a) of this section, except that the Office may, for good cause, extend up to an additional 30 days the time for commencing a hearing; and

(3) conducted, except as specifically provided in this chapter and to the greatest extent practicable, in accordance with the principles and procedures set forth in sections 554 through 557 of title 5.

(e) Discovery

Reasonable prehearing discovery may be permitted at the discretion of the hearing officer.

(f) Subpoenas

(1) In general

At the request of a party, a hearing officer may issue subpoenas for the attendance of witnesses and for the production of correspondence, books, papers, documents, and other records. The attendance of witnesses and the production of records may be required from any place within the United States. Subpoenas shall be served in the manner provided under rule 45(b) of the Federal Rules of Civil Procedure.

(2) Objections

If a person refuses, on the basis of relevance, privilege, or other objection, to testify in response to a question or to produce records in connection with a proceeding before a hearing officer, the hearing officer shall rule on the objection. At the request of the witness or any party, the hearing officer shall (or on the hearing officer's own initiative, the hearing officer may) refer the ruling to the Board for review.

(3) Enforcement

(A) In general

If a person fails to comply with a subpoena, the Board may authorize the General Counsel to apply, in the name

of the Office, to an appropriate United States district court for an order requiring that person to appear before the hearing officer to give testimony or produce records. The application may be made within the judicial district where the hearing is conducted or where that person is found, resides, or transacts business. Any failure to obey a lawful order of the district court issued pursuant to this section may be held by such court to be a civil contempt thereof.

(B) Service of process

Process in an action or contempt proceeding pursuant to subparagraph (A) may be served in any judicial district in which the person refusing or failing to comply, or threatening to refuse or not to comply, resides, transacts business, or may be found, and subpoenas for witnesses who are required to attend such proceedings may run into any other district.

(g) Decision

The hearing officer shall issue a written decision as expeditiously as possible, but in no case more than 90 days after the conclusion of the hearing. The written decision shall be transmitted by the Office to the parties. The decision shall state the issues raised in the complaint, describe the evidence in the record, contain findings of fact and conclusions of law, contain a determination of whether a violation has occurred, and order such remedies as are appropriate pursuant to subchapter II of this chapter. The decision shall be entered in the records of the Office. If a decision is not appealed under section 1406 of this title to the Board, the decision shall be considered the final decision of the Office.

(h) Precedents

A hearing officer who conducts a hearing under this section shall be guided by judicial decisions under the laws made applicable by section 1302 of this title and by Board decisions under this chapter.

Section 1406. Appeal to Board

(a) In general

Any party aggrieved by the decision of a hearing officer under section 1405(g) of this title may file a petition for review by the Board not later than 30 days after entry of the decision in the records of the Office.

(b) Parties' opportunity to submit argument

The parties to the hearing upon which the decision of the hearing officer was made shall have a reasonable opportunity to be heard, through written submission and, in the discretion of the Board, through oral argument.

(c) Standard of review

The Board shall set aside a decision of a hearing officer if the Board determines that the decision was –

(1) arbitrary, capricious, an abuse of discretion, or otherwise not consistent with law;

(2) not made consistent with required procedures; or

(3) unsupported by substantial evidence.

(d) Record

In making determinations under subsection (c) of this section, the Board shall review the whole record, or those parts of it cited by a party, and due account shall be taken of the rule of prejudicial error.

(e) Decision

The Board shall issue a written decision setting forth the reasons for its decision. The decision may affirm, reverse, or remand to the hearing officer for further proceedings. A decision that does not require further proceedings before a hearing officer shall be entered in the records of the Office as a final decision.

Architect of the Capitol Personnel Manual
Chapter 335, "Career Staffing"

Subchapter 4. Career Staffing Case Files

.1 Responsibility

.1 Servicing personnel specialists are responsible for establishing and maintaining the case file for each action they process under this Chapter. They shall ensure that the case file contains all of the documents used to process the action.

.2 Selecting officials and all others involved in the staffing process shall provide the responsible personnel specialist with all of the documents in their possession regarding an action. They may not retain copies of any documents.

.2 Maintenance of Files

Case files shall be maintained for, and destroyed after, five years by the HRMD. Files shall be maintained longer than five years if an active grievance or complaint on an action is in progress.

.3 File Contents

The case file shall contain:

.1 A copy of the Vacancy Announcement.

.2 A copy of the position description.

.3 A record of the names of all applicants for the vacancy and a record of the qualifications determination made on each of them.

.4 A copy of the crediting plan.

.5 A complete record of each evaluator's point awards for each applicant, if individual ratings are made, or the composite panel rating for each

applicants. The method of arriving at the composite rating of individuals shall be described in the documentation if individual ratings were initially made.

.6 A copy of any guidance and/or instructions issued to the panel.

.7 The name(s) of any candidate(s) receiving priority consideration and the basis for affording priority consideration.

.8 Copies of all certificates used to refer candidates to the selecting official.

.9 The record of any further screening actions taken on each referred candidate, for example, interview records, reference checks, etc.

.10 The documents submitted by all applicants.

.11 The basis for not considering any applicants, for example, incomplete applications, not basically qualified, ineligible, etc.

.12 The names and roles of all persons involved in processing the action.

.13 The rationale for using the supervisor or selecting official as the evaluator, if applicable.

.14 Copies of all other documents used to staff the vacancy.

.4 Release of Documents

.1 Copies of documents, or of the entire case file, may be furnished to applicants or their authorized representatives by written request or authorization of the applicant, provided the privacy of all other applicants can be protected. Documents and case files may, therefore, be edited to

preclude the identification of all applicants except the applicant requesting a copy of a document or the case file.

.2 Crediting plans may not be released without the approval of the Director, HRMD, unless subpoenaed by legal action.